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WHIPPING AND CASTRATION AS PUNISHMENTS FOR CRIME.

This paper is the outgrowth of an address delivered a few months since before a conference of the judges of the various Municipal and Police Courts of Connecticut. Upon them the State has cast the duty of passing in the first instance upon most charges of criminal conduct, and of inflicting the proper punishment for petty offences. They were assembled to consult as to the proper methods of judicial administration, and had expressed a wish to hear some discussion of the relations of penalty to crime.

Such a subject necessarily involves a recurrence to first principles, and to those moral considerations which underlie all human government.

Whence comes its authority to punish at all?

How can one man assume to restrain another man's liberty, or subject him to suffering and degradation, and claim a warrant from it under the principles of justice, which are at bottom principles of equality of right?

Am I my brother's keeper? And how does an aggregation of individuals gain a power which each by himself confessedly has not?

Nothing which belongs to the realm of the infinite and the divine can ever be fully apprehended by inhabitants of this little dot in the universe, which we call the Earth. But if Christianity be a true religion for mankind, and there are any teachings we can trace back to Christ, they surely comprehend the duty to render unto Cæsar the things that are Cæsar's, as well as unto God the things that are God's.

They comprehend also the still broader doctrine of the fatherhood of God and the brotherhood of man.

The tendency of our times has been to emphasize the second of these principles the more strongly. It is that which we can understand the best. But the fatherhood of God is the more important conception in respect to whatever belongs to the domain of government. A pure sentiment of fraternity leads logically to anarchy. Fatherhood implies power, restraint, correction. If in the moral system of our world there is punishment for sin, ordained of God, all considerations of analogy require that the governmental systems, under which its civil affairs are regulated, should provide punishment for those offences against the good order of society which we call crime. Nor, notwithstanding all that the school of Tolstoi may say, have the authoritative writers on the nature of Christianity failed to declare that this is so. When St. Paul sent his epistle to the Christians at Rome in the reign of Nero, they were restless under the strain of subjection to a tyranny that for them foreboded religious persecution. What is his word of advice? That all civil power in the State is ordained of God, and acts in the repression of crime as "God's minister, an avenger for wrath to him that doeth evil."[1]

And is not this general law of retributive justice in equal measure—aside from anything that Christianity teaches, and even from any conception of a personal God—part of the order of the universe?

The first lesson we learn in physics is that action and reaction are equal and proceed in opposite directions. If I give a blow with my fist to a tree, the tree gives my fist an equal blow. It pays me in kind. Animated nature of all forms seems governed by a law much the same. We get what we give.

This has been an age prolific of new sciences. One of them has for its object to stand guard over the interests of the worst of men in their dealings with society, and to keep all it can from meriting that name. We call it Penology, but it often seeks rather to exclude than to regulate punishment. It has done something towards propounding a new theory of morals,—something, one might perhaps say, towards interposing a check to the natural operation of the law of cause and effect in the dealings of governments with crime.

Have not some of its exponents gone too far in these directions? They assert that human punishment has no legitimate object except human reform, and that if it hurts, it hurts only to save. Five of our State Constitutions rest their penal codes

[1] Romans xii, 4.

upon this position.[1] But society needs saving from the criminal, quite as much as he needs saving from sin. "The wages of sin is death." To that end it logically tends. The extinction of sin may require the extinction of the sinner, at least, in this world.

The punishment of sin on earth is partly, at least, left to human government. When it takes the shape of crime, government must meet it with a strong hand, and add the human sanction to the divine,—the sentence of the courts to the sentence of the conscience and the community.

The law which is violated by a criminal act is an imperfect one unless it has provided a proper sanction. The sanction is improper if it inflicts any unreasonable injury upon the body, or upon the mind and character of the offender.

What, then, is the rule of reason for the administration of justice between organized society and the man who offends against its peace and order?

The nature of things, as has been said, would seem to require that he who strikes shall be struck back. In rude times that punishment is promptly administered by the party injured or his friends. The next step, as men become civilized, is to have the State do it. The *lex talionis* is followed. Three times over it is laid down as the fundamental rule of criminal justice in the Pentateuch; in Exodus, in Leviticus, and in Deuteronomy. In the New Testament, indeed, Christ tells his followers that it is no guide for the individual, as to his personal conduct.[2] He is not to punish at all, but to forgive. No reference, however, is made to punishment by the officers of government to vindicate its authority. Whether they may properly follow this rough rule of retribution is a question upon which we are left to seek for light elsewhere.

Every national habit which has endured through two generations comes to be generally regarded by the people as immemorial. It may have been contrary to what had always been before the practice of the inhabited world. It may still be contrary to that of all other peoples. Nevertheless, to those who have grown up under its influences, and from their earliest

[1] Indiana, New Hampshire, North Carolina, Oregon, South Carolina. Those of South Carolina and Georgia forbid punishment by whipping. Stimson's Am. Statute Law, I, 31.

[2] Matt. v, 38.

recollection saw it followed by their fathers as a settled rule of life, it will have all the sanction that a remote antiquity could bestow.

It has been to Americans a national habit for sixty years to punish all ordinary crimes by imprisonment, and imprisonment only. It has come to seem to us the natural way of treating convicts. Is it, indeed, this? Or may this national belief be a bit of provincialism, due to an inadequate consideration of the lessons to be learned in other lands or from other times?

In all previous centuries which have left us any record of human life, the prison played a temporary and insignificant part in the administration of criminal justice. Occasionally some prisoner of State was confined for years, or possibly for life, in the dungeons of a castle. Often these were used as a place of detention, in which to keep men a few days or weeks, until they could be brought up for trial. Now and then, some tyrant like Bomba of Naples of more recent days would abuse his power by keeping not only leaders in schemes of political revolution, but multitudes of their followers, under lock and key for an indefinite period, upon pretence that there had not been time to prepare the case against them. But all such instances of imprisonment were exceptions to the common rule. In nine cases out of ten, in ninety-nine cases out of a hundred, the man convicted of any of the common crimes, unless banished to some distant place of exile, was dismissed, after paying a fine, or being subjected to some form of bodily suffering or social degradation.

The substitution of imprisonment for all other forms of corporal punishment has involved the modern State in two great evils.

It has added enormously to its annual outgoes.

It has taken thousands of its people from their natural surroundings and opportunities for profitable industry, and shut them up in an artificial and unnatural environment, where they are almost always in a moral atmosphere that is foul and contaminating.

True, the attempt was early made, and has never been abandoned, to make the jail a school of discipline and reform. At the beginning of the eighteenth century, Pope Clement XI, in erecting the prison of St. Michael for juvenile offenders, and setting up there a system of manual training, put upon its walls the inscription, *Parum est improbos coercere pœna nisi bonos efficias disciplina.* But what has really been accomplished towards turning the convict out a better man than he went in?

One of the persons most closely connected with the State Reform School of Connecticut, stated a year or two ago that of the boys kept in the principal building of the institution, not one, so far as they could discover, led an honest life after his release, though part of those housed in detached cottages were apparently improved. A better showing is made by the statistics put foward by the Elmira Reformatory; but there are few Brockways to be had. No system of prison discipline is worth a rush as a mould of character, unless the man who is responsible for its administration is gifted with exceptional and, one might almost say, transcendent powers.

The great change in the system of criminal punishments to which I have alluded came to the United States as a part of the new life upon which they entered after their independence was established and the forms of modern government set up. It came gradually, and almost insensibly,—the natural outgrowth of democratic institutions. Whipping, branding, mutilation, and the pillory, one by one faded out of use before they disappeared from our statute books.

Most of these punishments are unsuited not only to modern democracy, but to modern life in all its aspects. The story of the "Scarlet Letter" can never be repeated.

The object of the *lex talionis* is to apply what seems the rule of natural justice. It is to punish; to punish in a way that will deter other men from acts of similar violence; and in many cases to stamp the offender with a mark that will be a perpetual warning to the rest of the community to be on their guard against him. But *summum jus* may be *summa injuria*. So harsh a remedy not only hurts the body; it often hurts the soul. The continuing degradation which it generally entailed, did as much as its cold cruelty, perhaps, to bring it into discredit. In most of our States, but one remnant of it now endures in our law,—that of capital punishment for murder in the first degree. Hanging hurts; but the hurt and shame of it are both needed, our people generally think, to give his due to the man who deliberately and maliciously takes another's life.

But is it certain that some other punishments which hurt might not also have been wisely retained, might not now be wisely re-instated for particular offences?

I do not hesitate to avow my conviction that whipping would often furnish a mode of punishment far more appropriate than fine or imprisonment for young offenders, and for some minor offences by full-grown men. It might also be a useful substitute for or addition to imprisonment for certain graver crimes.

While holding criminal terms of the Superior Court I have more than once had occasion to sentence culprits to confinement in jail, whose case would have been, in my opinion, better fitted by some form of punishment shorter in duration, and sharper in pain. Most Judges, I am sure, must sometimes have had similar feelings, on the bench, particularly in the case of boys, whose fathers had apparently spared the rod and spoiled the child.

To measure out punishment in all cases of serious crime by so many months or years in jail is to use but a rough yard-stick.

A London magistrate of long experience, Sir Edward Hill, once said that long sentences make very little difference in their deterring influence upon criminals as compared with short ones, for the simple reason that the criminal classes are devoid of imagination. They do not and cannot picture to themselves the dragging monotony, year after year, of prison toil, or month after month of prison idleness, with that vividness and sense of reality with which it strikes an industrious citizen. Whether they are sent up for two years or for twenty seems to them of slight account.

No sentence to a county jail is greatly dreaded by a hardened criminal. It gives him in most cases an assurance of better housing and of better food than he is in the habit of gaining by any other mode of exertion. He has never taken into his soul the full measure of the good of liberty. It is not a good, except so far as its possessor knows how to make good use of it; and that to him was never known, or but half known.

On the other hand, whipping is dreaded by every one, man or child. We shrink from it first and most, because it hurts.

It is no degradation to a boy to be whipped by his father, or by his master at school. That is not his objection to it. He feels that it is a reasonable and natural consequence of misdoing, and leaves him better rather than worse. The sailor and the soldier, until recent years, met it in the same way, and with no loss of spirit or loyalty to their flag. Custom, for them, had dissociated it from disgrace. It was simply retribution. In civil life, however, to the grown man, it is and always was a mark of degradation in the eyes of the community. But as a penalty for crime, it is a consequence of degradation rather than a cause of it. It was the crime that really degraded.

The criminal dreads whipping mainly, as the boy does, because it hurts. A French physician at the head of the great prison hospital at Toulon, in a work on the characteristics of convicts, has said that the abolition of punishment accom-

panied by torture has resulted in greatly augmenting the number of homicides.[1] A convict, whom he quotes, had been sentenced to fifty stripes. "Ah," said the man, "that is worse than fifty strokes of the guillotine. One suffers during it, and after it, too."

There has never been a time when whipping was not a mode of criminal punishment in at least one of the United States. The United States themselves introduced it together with the pillory into their original Crimes Act of 1790; but it was abolished by Act of Congress in 1839. Flogging in the army, however, continued until its character was revolutionized by the introduction of so vast a multitude of volunteers at the outbreak of the civil war. In the navy it was retained until 1872. Such a punishment on shipboard or in the camp, administered often in hot blood, immediately after the offence, and at the will perhaps of some petty officer, is unsuited to the condition of freemen.

Great Britain, however, did not abandon its use in her army until 1881, and it has never been discarded in England as a punishment for crime. In 1861, when her criminal procedure was made the subject of revision, it was given new prominence as a penalty for offences of boys. Soon afterwards it was added to imprisonment, in cases of robbery with personal violence, garroting or other aggravated assaults on life, and wife-beating. The results are conceded to have been most salutary.

Maryland in 1882 followed her example. Whipping was there made a penalty for wife-beating. In 1884 there were one hundred and thirty-one arrests upon this charge in the city of Baltimore. Early in 1885 a man, and the first white man, was sentenced under the new law to twenty lashes, besides a year in jail. At the close of the year, there had been only sixty-seven cases of wife-beating before the court. The next year showed a still further decrease, and the police authorities stated it as their opinion that the fear of a whipping had prevented half the assaults of this character that would otherwise have been committed.[2] As was rightly said by the father of the law in the Maryland legislature, the man who beats his wife and is cowhided for it by her father or brother is thought by all to have received his just reward; and why then cavil at a similar punishment inflicted in an orderly way, after a full hearing of his defence, by an officer of the law?

Let us admit that degraded as such a man is by his brutal act and the brutal heart behind it, he is further degraded by the

[1] L'Auvergne on "Les Forçats," 215.

[2] Report of the Am. Bar Association for 1886, 291.

whipping to which he may be sentenced. So far as concerns his relations to his particular friends and associates, I do not hesitate to say that he ought to be, and that this, however we may deplore his fall in the eyes of the world at large, is a strong argument for the infliction of this particular penalty. The social sting often goes deepest. A man hates to lose caste among those with whom he associates familiarly. The term "jail-bird" shows how the community regards the man who has been once sentenced to imprisonment. But his mates often look upon him as none the worse for it. He has simply been unlucky. Let him be stripped and put under the lash, however, and he sinks in their estimation. It may, indeed, have another good tendency from that very fact. It may drive him from out of their company, into that of honest men again. But, be this as it may, to flog one criminal deters, by the very disgrace of it, hundreds from crime.

To boys it could bring little of discredit or disgrace. It is a remedy that the world has always recognized as belonging to their time of life. In the great schools of England birching has been freely dealt out by the best teachers, and it brings no shame, unless there be a want of pluck to stand it bravely.

In Scotland, whipping was strongly recommended as the general punishment for juvenile offenders, in a Parliamentary Report presented in 1895 by a Departmental Committee, appointed to consider the subject.[1] In 1893, 335 boys had been thus flogged instead of being sent to jail; in 1894, 268; but the effect of this report was such that in 1898 there were 468 sentences to whipping and only 338 to imprisonment, while there was a diminution of the total number of juvenile offenders convicted by 178.

Virginia in 1898 reverted to a similar policy[2] by a statute authorizing whipping to be substituted for fine or imprisonment, at the discretion of the court, as the sentence upon a conviction for crime of any boy under sixteen years of age, provided the consent of his parent or guardian be first given.

Let any one familiar with the administration of criminal justice, and desirous to make it better, turn the light of his own experience on this subject; and as he looks back on the monotonous routine of the police court, with its sentence after sentence inflicted on the habitual rounder, to whom the jail has

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[1] Report of the Departmental Committee, etc., Edinburgh, 1895, p. xxxviii.

[2] Whipping was retained as one of the regular punishments in her code of 1860, but was abolished soon after the close of the civil war.

become a home, he must see cause to consider if one good whipping at the outset might not often have saved what has been not simply a wasted life, but a life that has wasted the property of the community and the peace of the State.

To replace whipping in the list of permissible punishments would not, of course, involve the restoration of the whipping post; nor is it a penalty appropriate to every case. Let it be inflicted in private, and, when upon grown men, for such offences only as involve great personal violence or indignity to another; unless, as in India, it be added to the sentence of habitual criminals, upon a third or fourth conviction.[1]

Nor should the cat o' nine tails or any similar instrument of torture be used. The birch or the leather strap will be sufficient for the purpose.

It is part of the general practice of penitentiaries to resort to whipping in addition to the penalty of imprisonment, where a convict proves idle or insubordinate. The warden of the State's prison of Connecticut, under the General Statutes, in case any prisoners "are disobedient or disorderly, or do not faithfully perform their task, may put fetters and shackles on them, and moderately whip them, not exceeding ten stripes for any one offence, or confine them in dark and solitary cells."[2] A similar authority is given to the Superintendent of its State Reform School, by the rules of that institution, and is held and used in most States by similar officials, the Elmira Reformatory constituting no exception.

Why need we hesitate to punish a criminal in this way for his crime by the sentence of a court, when we allow it for mere disobedience to the orders of his jailer, and at that jailer's will? May it not, we may further ask, be a lighter punishment than confinement in "dark and solitary cells" for such time as the warden may think fit? Those of us who remember the thrilling pages of Charles Reade's *Never too Late to Mend*, will have no great hesitation as to the answer.

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[1] In the YALE LAW JOURNAL for May, 1899, a distinguished member of the Baltimore bar advocates the sentence to death of criminals who suffer a third conviction for any atrocious offence, committed under circumstances arguing exceptional moral depravity. In some States a third conviction for felony places a man in the position of an "incorrigible," and he is to be confined indefinitely in the State's prison. A sound flogging would seem to me a better introduction to a third term, and if occasionally repeated during its continuance would be very apt to keep the offender from ever getting into the walls of the penitentiary again.

[2] Gen. Stat., Sec. 3341; originally adopted in 1773.

There is a certain crime of which one seldom speaks. Its very name has come to be banished from our newspapers. Yet the thought of it is a daily terror to every woman in the South, and brings a sense of uneasiness and constraint into the life of her Northern sisters. It is the cause of most of those lynching cases which disgrace our civilization. It is to be kept down only by the severest methods. Is it too much to say that if the courts are not ready to apply these, the people will? The people who may thus bring some ruffian to his death will not be the best people in the community. They will probably rush into acts of savage cruelty. They may occasionally seize the wrong man. But has a conviction ever yet been had in the United States of any one of a mob of lynchers for hanging a man accused of rape?

That crime does a wrong to a woman which many of them have deemed worse than death. In every country where men alone make the laws, they owe a special duty to secure the weaker sex against it, and to punish it, whenever committed, with just severity.

In the early days of New Haven Colony, the laws provided, with meaning obscurity, that it should be "severely and grievously punished"[1] by the magistrates. It is probable that the planters had in mind that this grievous punishment might sometimes be castration.[2] Can there be one more precisely answerable to the wrong?

In the early criminal codes of Europe we find it in use for several of the graver crimes. In the laws of the Visigoths, it was inflicted for sodomy.[3] William the Conqueror brought it into England for rape, and—coupled with putting out the eyes that had "looked upon the woman to lust after her,"—it stood as the legal punishment until sixty years after the grant of *Magna Charta* (3 Edward I).[4]

In Connecticut, the first record of any recourse to it is found in the first half of the eighteenth century. A man convicted in the Superior Court of mayhem, was sentenced to this form of mutilation because it was doing to him precisely what he had done to another. At that time there was no punishment prescribed by law for such a crime. There was a statute, which

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[1] N. H. Col. Rec., II, 578.

[2] N. H. Col. Rec., II, 601; citing Leviticus xxiv, 19. I find no record of any conviction for rape.

[3] Heineccius' Corpus Juris Germanici, 1947, 1948.

[4] 2 Coke's Inst. 180, 181.

had been in force since 1672, "that no Bodily Punishment shall be inflicted that is Inhumane, Barbarous, or Cruel."[1] The court stayed judgment until the will of the General Assembly could be known. That body thereupon resolved "that the Judges cause such punishment to be inflicted as to justice appertains, according to their best skill and judgment." The Superior Court was then composed of Roger Wolcott as Chief Justice, who was afterwards Governor of the Colony; James Wadsworth; Joseph Whiting; William Pitkin, afterwards Chief Justice; and Ebenezer Silliman. It has seldom in its history been better manned. They did not think it inhuman or cruel to adopt the *lex talionis*, and passed sentence of *membrum pro membro*.[2]

Forty years later, at the close of the Revolutionary War, a British deserter, who had been sentenced by the Superior Court to death for rape, preferred a petition to the General Assembly for a commutation of punishment. The woman did not wish to press the charge, and she had been the only witness against him. The Assembly granted the petition and ordered the sheriff to castrate him and let him go, unhanged.[3]

Some years ago, John Hooker, the late Reporter of the Supreme Court of Errors of Connecticut, a man whose humane temperament and philanthropy are as well known as his critical and philosophic knowledge of the law, wrote on this subject for the press, in advocacy of our return to the use in this respect of the *lex talionis*. At about the same time, a petition to Congress to introduce it into the system of criminal procedure of the District of Columbia was sent in by a number of women, headed by the wife of the then Chief Justice of the United States, Mrs. Waite. The Woman's Christian Temperance Union published, not long since, a vigorous article, in favor of the general adoption of the penalty for this particular crime, by Dr. Thomas D. Crothers of Hartford.

There are weighty reasons for it.

As fully as the death of the criminal, it ensures the community against his repetition of the offense. It reforms his body if it does not his soul. A convict is now (1899) in the State prison of Connecticut upon a second conviction for this crime.

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[1] Stat., Ed. 1715, 99.

[2] Rex v. Barney, Col. Rec. of Conn., VIII, 578; State v. Danforth, 3 Conn. Rep. 120 (Peters, J.) The next year a statute was passed to make such an offence a capital crime.

[3] Conn. Mss. Rec. in State Library, Crimes and Misdemeanors, VI, 220, May, 1783. I am indebted for these references to the kindness of the accomplished State Librarian, Dr. Chas. J. Hoadley.

His first term of imprisonment had no deterrent influence on him. Twenty-two in all are there for this offense, and twelve more for an attempt to commit it.

Such a punishment is also appropriate in this. It puts on the criminal a shame of the same nature that he has put upon another. It dishonors and degrades, as he has dishonored and degraded.

It would be dreaded by most men, little less than capital punishment; but less it would be, for there are few who do not cling to life under the most adverse circumstances. Rape ought not to be punished as heavily as deliberate murder with malice aforethought. It is an offence that is seldom long premeditated, and to which men are urged by a blind, impetuous passion which, while it cannot excuse, may sometimes extenuate the wrong. Nor in the interest of the woman, ought rape alone to be visited with as great a penalty as rape followed by murder. If it were to be, the murder often would ensue; for the dead tell no tales.

There are two objections, and really but two objections, to re-instating this ancient penalty of law.

It involves an act which might be criticised as cruel; and its effect is to lower a human life, beyond recovery.

As for the cruelty of it, the same degree of suffering is inflicted, for a purpose in one respect not dissimilar, on half of our larger domestic animals. We do not deem it cruelty to them. It is an adjustment to their environment in society. It is necessary to make it safe to keep them about us.

The same thing has for ages been often done to boys in Italy, to serve the purposes of church and operatic music. The terms "Castrato" and "Singer to the Pope" were used there as synonomous late into the last century.[1]

It is what many sociologists are gravely considering as a possible and permissible mode of preventing the propagation of a degenerate class of imbeciles or paupers. It is what, in fact, is being actually done in a quiet way by not a few of the medical profession who are in charge of almshouses and other public institutions in which are feeble minded children, the progeny of a worthless stock. Their castration is sometimes deemed an appropriate remedy to which to resort to prevent their falling into vices or disorders, to which their nature makes it difficult for them to offer any effectual resistance; and none the less appropriate, because it will end the line of a family which is misusing the earth.

[1] Beccaria on Crimes and Punishments, Chap. XX.

There is in at least one of our States[1] a statute making it a State's prison offence to marry or to have sexual intercourse with one of the class known as feeble-minded.

If this be within the power of government, it might well be asked whether it would not be more merciful legislation instead of leaving the dull-witted victim of degeneracy to maintain a life-long struggle with a force within, which he has neither the reason nor the moral force to keep within due bounds, to provide for exterminating the useless force and so saving the almost useless struggle. But whether so extreme a remedy be justified or not in the case of those stamped from birth with inferiority to their race and unfitness for their environment, that it has been so much as thought worthy of serious consideration is enough to call for far more serious study of the question of its application to the man whose own act has shown him unable to keep within the bounds of decency in social life. What is harsh to the unfortunate may be just to the guilty.

To treat men thus would certainly be, in each case, to lower a human life beyond recovery. It would indeed make crime yield bitter fruit. But this ruined life has been the means of ruin to another life. It loses, as it has destroyed.

There is a crime still meaner than that to which I have alluded, that a man can commit towards the weaker sex. It is when he lures a child into dishonor. The penalty to be measured out for any act must be partly determined from its natural consequences. This act, therefore, is not one to be punished as rape or murder is. But a sentence to mere imprisonment seems to me a very inadequate one. If every such offender were also smartly whipped, I believe there would soon be fewer of them.

The apprehension of resultant bodily pain is a strong deterrent to any course of action by ordinary man or brute. It is nature's penalty for any abuse of our physical powers,—her inevitable penalty, we may say, in the end. The man has no right to complain who is made to suffer it for a physical outrage wantonly committed on a child.

It is not uninstructive to look back to the early part of the century and review the practical effects of the abolition of whipping as a punishment for crime.

I may pardoned if I appeal again particularly to the experience of the State with whose history and institutions I am best acquainted.

[1] Connecticut. Public Acts of 1895, pp. 667–710.

This penalty was discarded in Connecticut upon a general revision of its criminal code in 1830.[1]

It had been the commonest one during the greater part of the history of the commonwealth. The convict was flogged and then dismissed. Few were sentenced to imprisonment, except for crimes so aggravated as to require their confinement in Newgate.

A great increase in petty crimes naturally followed its abandonment.

The negroes had always been the most common offenders. The vices of slavery still tainted their character. They constituted a third of all the prisoners in Newgate, then the State penitentiary, in 1826, although our colored population was then but 8,000 out of a total of nearly 300,000. There were more of them in the State prison in 1838 than there were in 1898.[2] The county jails had no terrors for them. There they could find the only ground on which to mingle with their white fellow citizens on terms of social equality. They were sensitive to pain, and had thoroughly disliked being flogged.

So, it seemed, had many others, whom now there was little to deter from violating the law. In 1821, under the old order of things, there were forty-five commitments to the New Haven County jail. The year after the abandonment of the whipping-post, the number rose to 95. Five years later it was 270.

The discipline in all such institutions is necessarily lax. The food is abundant, the roof weather-tight, and the society generally quite congenial. In a report on the New Haven jail, made in 1838, one of its convict inmates was quoted as saying "that he had no objection to being shut up there, so long as he had cards and a plenty of company."[3]

The position of affairs was thus summarized in the report of the Joint Standing Committee on the State Prison to the General Assembly of Connecticut in 1840:

"In the present state of our criminal law, there is almost an impunity for offences not punishable in the State Prison; pecuniary fines, and imprisonment, are the only punishments that the humanity of the age would tolerate. The first, from the circum-

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[1] Acts of 1830, Chap. I. In the very careful Revision of 1821, it had been retained for thieves and tramps.

[2] Forty-nine out of 190 convicts in 1838; forty-seven out of 513, in 1898.

[3] Report of committee to meeting of citizens held Dec. 12, 1838, printed in 14th Ann. Report of Boston Prison Discipline Society, 1839, p. 368.

stances of the offender, is generally nominal, and the latter is only a charge upon the public, and a matter of derision to the idle and dissolute offender."

The half century that has elapsed since this report was made has wrought considerable changes in our county jails. They have become cleaner, healthier, quieter. And what has been the effect on "the idle and dissolute offender," to whom the committee referred? We find that if he does not relish the greater order and better discipline, he can appreciate the greater warmth, light and cleanliness, and the better table. If he is put there once, he is apt to be found a returning guest.

Whoever candidly reviews this subject, comparing theory with experience, sentiment with facts, must admit that the system of corporal punishments so hastily abandoned in this country during the first half of the nineteenth century, was not wholly wrong. A few months since the grand jury at the Warwickshire assizes in England made a presentment in favor of flogging for criminal assaults on women and children. The opinion of thoughtful men seems gradually shaping itself towards that end on both sides of the Atlantic, and other States may well consider whether they ought not to range themselves by the side of Maryland in bringing back some such remedy for the effectual support of the weak against the strong, and of the young criminal against himself.

Governor Buckingham of Connecticut once stated that no white man had ever been whipped twice, under a judicial sentence, in that State. There have been many who have gone back to jail ten and twenty times.

The tendencies of society on the Continent of Europe have during this century been strongly against the infliction of corporal chastisement. The people are afraid to trust the government with such a power. We do not find it in their penal codes.[1]

It is only in a free State, that has long been free, that the magistrate is under no natural bias to abuse such a preroga-

[1] See Hungarian Penal Code of 1878, and Italian Penal Code of 1889. *Annuaire de Législation Étrang.* 1879, 272:1890, 402. Macaulay, in his draft of a penal code for India, while admitting that flogging might be a proper punishment for juvenile offenders, did not recommend it. Notes on the Indian Penal Code, Macaulay's Works, iv, 196. It did, however, find a place in the code as finally perfected, and since 1864 may constitute the only punishment for any crime committed by a boy, which is less than capital. It is also made a penalty which may be and often has been added to imprisonment, in case of the recidivist or habitual criminal.

tive. There the absence of ranks and class distinctions makes it reasonably certain that a sentence to a flogging will be passed only as an act of justice, and not from feelings either of contempt or of fear.

I believe that President Woolsey was right when he said that the only theory of criminal punishment which rested on solid ground was that to punish was to give the offender his deserts, and that government had a right to use its power for that end.

But if we were to accept the sentimental or humanitarian position, that the right to punish rests on the duty to educate the ignorant and reform the vicious, I should none the less insist that whipping was, for many cases, the best incentive to education and reform. He who has learned to refrain is half reformed. A whipping has a very direct tendency to teach a man to refrain from whatever is likely to entail another punishment of the same sort. It may be the salvation of a boy, who would otherwise be sent to a Reform School that does not reform, or to a jail that he would find a school of crime.